No. 771

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1946

EDWARD VANCE,

Appellant,

against

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Appellees.

BRIEF ON BEHALF OF CERTAIN APPELLEES APPEARING SPECIALLY ON THE MOTION TO DISMISS MADE BELOW, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

MAURICE J. O'SULLIVAN,
JOHN C. KILLIGER, JR.,
Attorneys for Defendants-Appellees, named herein, appearing specially in opposition to petition for a writ of certiorari.

LOUIS D. FROHLICH,
HERMAN FINKELSTEIN,
LAWRENCE C. GIBBS,
of Counsel.

APPELLATE LAW PRINTERS, NEW YORK CITY

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BRIEF ON BEHALF OF CERTAIN APPELLEES

Preliminary Statement

This action is purportedly brought under the Sherman Anti-Trust Act (Pet., pp. 14-15).

Plaintiff-appellant petitions this Court to review directly two orders of the United States District Court for the Western District of Missouri, Western Division, dated October 9, 1946 and October 29, 1946, respectively (Pet., p. 6). The first of these orders dismissed the amended complaint herein (Pet., p. 99). The second of these orders denied plaintiff's application to review and vacate the order dismissing the complaint (Pet., p. 104).

Plaintiff's application in the District Court for leave to appeal directly to this Court was denied on November 7, 1946 on the ground that such direct appeal was "not permitted by law" (Pet., p. 105).

The History of the Action

This action was instituted by the filing of a complaint in the United States District Court for the Western District of Missouri, Western Division, on May 15, 1946 (Pet., pp. 14-42). Three similar actions previously instituted by plaintiff against the same defendants had been dismissed (Pet., p. 50).

On June 7, 1946, appellees herein, together with certain of the other defendants, appeared specially and moved for an order dismissing the complaint on various grounds set forth in the notice of motion (Pet., pp. 49-58). The motion to dismiss was granted by District Judge Collett on June 19, 1946, with leave to plaintiff to amend his complaint "to comply with Rule 8" (Pet., pp. 61-63).

On June 25, 1946, plaintiff served a document which he entitled an "amended complaint" (Pet., pp. 63-66). Appellees herein again appeared specially and moved "to quash the returns of service upon them and to dismiss the amended complaint" (Pet., pp. 73-75). Before any decision was rendered on that motion, plaintiff served a second amended pleading (Pet., pp. 78-80).

Once again, appellees herein appeared specially and made a motion "to quash the returns of service upon them and to dismiss the amended complaint" (Pet., pp. 87-89).

On October 9, 1946, District Judge Ridge granted the motion to dismiss on the ground that plaintiff had "not complied with the order of this Court heretofore entered on June 19, 1946, commanding plaintiff to comply with Rule 8 of the F.R.C.P." (Pet., p. 99). The order of dismissal was based upon the further grounds that, on the face of the amended pleadings, it was disclosed that "this

Court does not have jurisdiction of the cause of action attempted to be stated" and that "no facts [were] alleged in said amended pleadings stating any claim against any of the defendants upon which relief could be granted" (Pet., pp. 99-100).

On October 14, 1946, plaintiff moved to review the amended pleadings and to vacate the orders dated June 19, 1946 and October 9, 1946, respectively (Pet., pp. 100-104). That motion was denied by District Judge Ridge on October 29, 1946 (Pet., p. 104).

Plaintiff then moved in the District Court for leave to appeal directly to this Court. Prior to any disposition of that motion, and on November 6, 1946, plaintiff made the instant application directly to this Court for a writ of certiorari (Pet., pp. 6-7).

District Judge Ridge denied plaintiff's motion for a direct appeal on November 7, 1946, holding that such an appeal was "not permitted by law" (Pet., p. 105).

On the following day, plaintiff served a notice of appeal to the Circuit Court of Appeals for the Eighth Circuit from the order dated October 29, 1946 (Pet., p. 106). That appeal has since been withdrawn.

Appellees' Contention

The appellees herein base their opposition to the granting of plaintiff's petition for a writ of certiorari on the grounds that:

(1) An appeal directly from a District Court to the Supreme Court may not be taken in an anti-trust suit unless

the United States is the complainant and a *final* decree has been made in the District Court (§29, Title 15, U. S. C.); and

(2) This Court is without jurisdiction to issue a writ of certiorari inasmuch as the action has not been "in" a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia (§347, Title 28, U. S. C.).

POINT I

This Court is without jurisdiction to hear the instant application. The petition must therefore be dismissed.

Inasmuch as the complaint purports to allege a cause of action under the Sherman and Clayton Anti-Trust Acts, it is pertinent to note Section 29, of Title 15, U. S. C., to the extent that provision is therein made for an appeal directly to the Supreme Court from a District Court. This section provides as follows:

> "In every suit in equity brought in any district court of the United States under sections 1-7 or 15 of this title, *wherein the United States is complainant*, an appeal from the *final* decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof."

Thus, it is apparent that only in an anti-trust suit wherein the United States is the complainant may an appeal from a *final* decree of the District Court be taken directly to this Court. *Columbia Gas Co.* v. *Amer. Fuel and Power Co. et al.*, 322 U. S. 379, 384 (1943).

The circumstances under which an application for certiorari may generally be made by a litigant is set forth in Section 347, Title 28, U. S. C. That section provides as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."
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> * * *
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> "No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Thus, an application for a writ of certiorari is proper where a case has been reviewed either in the Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, *but not otherwise*. *House* v. *Mayo*, 324 U. S. 42, 44 (1944).

Inasmuch as an order sustaining a demurrer is not a final order within the meaning of the Judicial Code (28 U. S. C. §225), an appeal therefrom would not even lie in the Circuit Court of Appeals. *Dye, et al.* v. *Farm Mortgage Inv. Co. of Topeka, Kan.*, 70 Fed. [2d] 514, 515 (C. C. A. 10, 1934).

There not having been any final judgment entered below, this Court has no jurisdiction to issue a writ of certiorari. The petition must therefore be dismissed. *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U. S. 99, 101 (1912); *Missouri & Kansas Interurban Railway Company* v. *City of Olathe, Kansas*, 222 U. S. 185, 186 (1911).

CONCLUSION

In the light of the foregoing, it is respectfully submitted that the petition for a writ of certiorari to the District Court, be in all respects denied.

MAURICE J. O'SULLIVAN,
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Attorneys for Defendants-Appellees, American Society of Composers, Authors and Publishers, Deems Taylor, George W. Meyer, Max Dreyfus, Shapiro, Bernstein and Co. Inc., Edwin H. Morris and Co., Inc., Martin Meltzer, Dick Howard, Bob Ellsworth, Russ Morgan, Curt Massey and Arbie Gibson, appearing specially in opposition to petition for a writ of certiorari.

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